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No. 07-1297

Supreme Court, U.S.
FILED
JUN 13 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRENT POLL,

Petitioner,

vs.

HENRY M. PAULSON, JR., Secretary,
United States Department of Treasury, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner respectfully moves this Court for an order (1) vacating its denial of the petition for a Writ of Certiorari (entered on 19 May 2008) and granting the petition; or as an alternative (2) vacating its denial of the Petition, granting the petition and remanding the matter to the Tenth Circuit with instructions for proceedings consistent with the importance of evidence provided by the agency's designated proposing official/oral-reply officer as emphasized in the initial petition to this Court and with recent decisions by this Court regarding retaliation-related lawsuits. Intervening events and grounds for this motion are as follows:

I. This Court's opinions of 27 May 2008 on *Gomez-Perez v. Potter* (case #06-1321) and *CBOCS West, Inc. v. Humphries* (case #06-1431) allow retaliation-related lawsuits, including those premised on conduct-based discrimination, to move forward so injured parties can recover damages. Petitioner's case is a discrimination/retaliation-based lawsuit. The same arguments and opinions voiced by the majority on those cases are applicable to the petitioner's case.

Although in dissent, Justice Thomas provided an example of retaliation which equates closely with the petitioner's case. The Justice asked, "consider, for example, any employer who fires any employee who complains of race discrimination, regardless of the

employee's race. Such an employer is undoubtedly guilty of retaliation."[1] In case #07-1297, Przecha's evidence states that the petitioner "was reassigned from Ogden to Fresno for the express purpose of firing him."[2] This was concurrent with the petitioner being labeled as "anti-management" for reporting gross mismanagement and representing an African-American with that gentleman's own EEO complaint.[3]

Also in dissent, Chief Justice Roberts stated that "Congress has always protected federal employees from retaliation through the established Civil Service process."[4] The Chief Justice supported this statement by citing 5 U.S.C. § 2302(b)(9) which "plainly applies to retaliation for exercising rights under the civil rights statutes."[5] Petitioner too argued[6] that the respondents were obligated under this statue to voluntarily correct the wrongful reassignment/wrongful termination proven in Przecha's declaration, but they failed to do so.

If top-level officials in federal agencies are brazen enough to retaliate, or tolerate retaliation, one should

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[1] See ***CBOCS West, Inc. v. Humphries***, case #06-1431, dissent p. 4.

[2] See Supreme Court case #07-1297, p. 5.

[3] See Supreme Court case #07-1297, p. 17.

[4] See ***Gomez-Perez v. Potter***, Supreme Court case #06-1321, dissent p. 1.

[5] See *Gomez-Perez v. Potter*, Supreme Court case #06-1321, dissent p. 13.

[6] See Supreme Court #07-1297, p. 18.

expect them to be bold enough to coverup their misconduct and compromise the administrative processes under their jurisdiction that are meant to enforce the retaliation-related laws and regulations at issue.

The respondents unilaterally closed petitioner's open EEO complaint and directed him, against his wishes, to the Merit Systems Protection Board (MSPB).[7] They then successfully argued to the MSPB that the petitioner should not be afforded the time to hire an attorney familiar with MSPB proceedings or conduct discovery before the hearing. Although so unfairly handicapped, the respondents case-in-chief was dismissed by the administrative law judge as being predicated upon "hearsay upon double-hearsay."[8] However, she allowed supposed rebuttal testimony from Mr. Bevan Higbee, which if true, could have served as a basis for discipline in Ogden, but not a reassignment to Fresno. Mr. Higbee's input, however, when repeated later was challenged and dismissed in a 1987 settlement agreement as being without a factual basis.[9]

While contrary to the requirements of 5 U.S.C. § 2302(b)(9), as Chief Justice Roberts expected them to be applied to "protect" federal employees, and 29 C.F.R. § 1614.102(a)(2)(3)(6); the respondents were not held accountable for their manipulation of the administrative processes under their control. If

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[7] See Supreme Court case #07-1297, p. 13.

[8] See Tenth Circuit Court case #06-4177, App. 75.

[9] See Tenth Circuit Court case #06-4177, respondents' exhibit 'D', item #3, App. 54, 55.

Przecha had not provided his authoritative input (about nine months after the MSPB decision) to prove this manipulation and provide the basis for a new proceeding, the petitioner would have been deprived of due process and the retaliations by respondents would be forgotten.

II. On 8 January 2008, the Tenth Circuit's decision on case #06-4177 (Supreme Court case #07-1297) was applied as "relevant case law" to decide Utah District Court case #1:06-CV-00144TC.[10] This goes "beyond the academic or episodic"[11] degree of importance and greatly expands the potential adverse-impact of the error by the Tenth Circuit; i.e., its finding that the Agency's proposing official/oral-reply officer offered nothing more than "simply that . . . a piece of evidence – and not the basis for bringing an entirely new proceeding."[12] Usage of this erroneous finding as relevant case law assures that it will "have continuing future consequences."[13]

As with the Tenth Circuit case #06-4177, District Court case #1:06-CV-00144TC was an entirely new

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[10] See ***Poll v. Paulson***, Utah District Court case #1:06-CV-00144TC.

[11] ***Rice v. Sioux City Cemetery***, 349 U.S. 70, 74 (1955).

[12] See Supreme Court case #07-1297, App. 8, first para.

[13] Justice Harlan, some aspects of the Judicial Process of the Supreme Court of the United States, 33 AUSTL L.J. 108 (1959).

proceeding predicated on the 'new' August 1984 evidence provided by Albert Przecha (the Agency's designated proposing official/oral-reply officer). The first case, as reflected in the Petition for a Writ of Certiorari, addressed the petitioner's wrongful termination and violations of adverse-action laws and regulations. The second alleged suppression of a properly filed EEO complaint. As outlined in guidelines from the Equal Employment Opportunity Commission, undue delays in processing an EEO complaint represent a separate form of retaliation. The second case involved different time frames, different violators and violations of different Federal regulations.

The following is a brief overview of the coverups which necessitated Utah District Court case #1:06-CV-00144TC:

The respondents claimed in 2005 that they had specifically settled the Przecha evidence in 1987 as EEO retaliation complaint #TD 85-2512. They withdrew this false claim after evidence was provided by the petitioner refuting it. Between 1987 and 2005, the respondents falsely claimed that they had settled the Przecha evidence with a 1987 settlement agreement but no specifics were offered and the settlement never mentioned Przecha. Between 1985 and 1987 the respondents falsely claimed (through interaction with OPM/NACI), that the Przecha evidence did not exist in an official form. After two years, the tangible evidence was finally provided. Those misrepresentations injured the petitioner as cited in the complaint.

Each misrepresentation also should have served as the basis for discipline against the perpetrators as required by 29 C.F.R. § 1614.102(a)(6) and IRM 6.751.1.16.2.

While the two retaliation cases were related but separate as described above and throughout the text of the respective cases,[14] both were premised on the importance of the Przecha evidence. The error by the Tenth Circuit Court on the first case, which dismissed the input of the proposing official/oral-reply officer as "simply" another piece of evidence, was repeated on the second. As the higher court's decision was treated as "relevant case law," the importance of the regulatory role of the proposing officials/oral-reply officers was greatly diminished in the Tenth Circuit from that defined in the plain language of the controlling regulations[15] and the importance of oral-reply officers (including the answers provided to them) as shown in another Federal circuit.[16]

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[14] While different, common elements involving both cases suggested merging them for judicial economy. This was proposed within the text of the second case.

[15] See IRM 6.752.2 and 5 C.F.R. § 752.403-404.

[16] See ***Loui v. Merit Systems Protection Board***, 25 F.3d 1011 (C.A. Fed. 1994).

III. After the decision by this Court on case #07-1297, the respondents pressed for sanctions imposed by the Tenth Circuit Court.[17] Payment of $4048.58 was made by the petitioner on 2 June 2008 to avoid further charges. Sanctions would not have been imposed if the Tenth Circuit Court had given due credence to the importance of the proposing official/oral-reply officer (the Przecha evidence), or been privileged to the new opinions cited above, rendered by this Court on 27 May 2008.

The Tenth Circuit Court was incorrect in stating that the petitioner had not established a basis for the District Court's jurisdiction, and had presented "no new arguments not already dispatched by the District Court in its 1998 denial of mandamus."[18] The respondents' own submission showed the District Court's ruling in this instance did not prohibit "plaintiff from seeking redress (regarding the Przecha evidence) from the Merit Systems Protection Board and/or the Equal Employment Opportunity Commission."[19] The petitioner acknowledged this decision by the Court, and "the right to restart the new Przecha evidence through the EEO appeal process."[20] This restart was shown in respondents' submission to the Tenth

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[17] See Supreme Court case #07-1297, App. 9.

[18] See Supreme Court case #07-1297, App. 8.

[19] See Tenth Circuit Court #06-4177, App. 130.

[20] See Tenth Circuit Court #06-4177, App. 180.

Circuit Court.[21] As the new 1984 Przecha evidence was appropriately reactivated through agency EEO complaint processes, the Tenth Circuit Court's finding that it was "simply" just another piece of evidence and not sufficient to warrant an "entirely new proceeding" became the focus of the appeal to this Court.

While petitioner understands that "writs of certiorari are matters of grace" and "may not involve considerations of the merits,"[22] he contends the supervisory powers of this Court need to be exercised when a circuit court compounds its erroneous interpretation of agency and federal regulations (i.e., the importance of the role and evidence provided by proposing officials/oral-reply officers) through imposition of sanctions against petitioners who attempt to have those regulations enforced in accord with the plain language in which they are written. Reticence in exercising such supervisory discretion in such cases, constitutes a "serious hindrance to effective administration"[23] of the involved federal statutes and agency regulations. This is particularly so when other courts in the Tenth Circuit are already embracing the erroneous interpretation as relevant case law.

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[21] See Tenth Circuit Court #06-4177, App. 58 lines 18-23.

[22] See ***Wade v. Mayo***, 334 U.S. 672, 680 (1948).

[23] See ***Rothensies v. Electric Battery Co.***, 329 U.S. 296 (1946).

CONCLUSION

For the above reasons, as well as those contained in the petition for writ of certiorari, the petition for rehearing should be granted, the petition for writ should be granted and petitioner respectfully requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Alternatively, petitioner respectfully requests that the petition for rehearing be granted, the petition for writ of certiorari be granted and that this Court remand this matter for further proceedings consistent with its recent opinions cited in item (I) above.

Respectfully submitted,

BRENT POLL, pro se

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

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BRENT POLL,
pro se